

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended)	WT Docket No. 99-87
)	
)	
Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies)	RM-9332
)	
Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz)	

To: The Commission

**REPLY COMMENTS OF
CELLNET DATA SYSTEMS, INC.**

CellNet Data Systems, Inc. ("CellNet"), by its attorneys, and pursuant to section 1.415 of the Commission's Rules, hereby replies to the comments filed on the Commission's Notice of Proposed Rule Making, released March 25, 1999, FCC 99-52 ("NPRM") in the above-captioned proceeding. Approximately fifty substantive comments were filed on the Commission's proposal to establish rules and policies governing private wireless spectrum that are necessary or appropriate to implement statutory changes to the Commission's auction authority. As discussed below, a broad consensus among the commenters has emerged that the current site-by-site licensing regime best satisfies the Commission's statutory mandate for licensing private radio spectrum. This consensus must form the basis for the Commission's resolution of this proceeding.

I. THE COMMENTERS AGREE THAT THE COMMISSION SHOULD RETAIN ITS CURRENT SITE-BY-SITE LICENSING REGIME

As CellNet pointed out in its comments, the plain language of sections 309(j)(1) and (6)(E) of the Communications Act of 1934, as amended, (“the Act”) clearly conditions the Commission’s auction authority with the requirement that the Commission first take measures to avoid mutual exclusivity.¹ The overwhelming majority of commenters agree.² To this end, most commenters also agree that the current private wireless licensing scheme — using site-by-site licensing on a first-come, first-served basis — avoids mutual exclusivity as a general matter.³

Based on the clear statutory language, and the record developed thus far, therefore, the Commission must employ methods to avoid mutual exclusivity, and can do so by retaining its current

¹ See Comment of CellNet at 5-8. See also 47 U.S.C. §§ 309(j)(1), (6)(E).

² See Comments of the American Petroleum Institute (“API”) at 14-16; Comments of Amtech at 6-8; Comments of the Association of American Railroads (“AAR”) at 7-9; Comments of Energy Services, Inc. (“ESI”) at 4-5; Comments of Cinergy Corporation (“Cinergy”) at 4-5; Comments of the Commonwealth Edison Company (“CEC”) at 5-7; Joint Comments of the Industrial Telecommunications Association, Inc., the Council of Independent Communications Suppliers, the Taxicab & Livery Communications Council, and the Telephone Maintenance Frequency Advisory Committee (“ITA”) at 3; Comments of the Maryland Transportation Authority (“MTA”) at 3; Comments of Motorola at 7-8; Comments of the New York State Thruway Authority (“NYSTA”) at 2; Comments of the North Texas Communications Council (“NTCC”) at 2-5; Comments of the Office of Advocacy, U.D. Small Business Administration (“OSBA”) at 2-4; Comments of the Personal Communications Industry Association, Inc. (“PCIA”) at 4-5; Comments of the Private Internal Radio Service Coalition (“PIRSC”) at 6-7, 9-14; Comments of the Union Electric Company (“UEC”) at 4-5; Comments of USMSS, Inc. at 2-4; Comments of the United Telecom Council (“UTC”) at 5-8.

³ See Comments of CellNet at 7; Comments of Amtech at 5-6; Comments of AAR at 7-8; Comments of ESI at 7; Comments of Cinergy at 7; Comments of CEC at 8; Comments of Ford Communications, Inc. (“Ford”) at 2-3; Comments of the International Communications Association (“ICA”) at 3; Comments of ITA at 6; Comments of LMCC at 3-5; Comments of MTA at 3; Comments of Motorola at 7-8; Comments of NTCC at 3; Comments of OSBA at 3; Comments of PCIA at 2-4; Comments of UEC at 7; Comments of USMSS, Inc. at 4.

site-by-site licensing method. Indeed, the Commission is precluded from changing the licensing scheme to one such as geographic licensing, which would create mutual exclusivity, unless the Commission makes a finding that the current scheme and any other alternative licensing schemes that avoid mutual exclusivity are adverse to the public interest.⁴ No such finding can be made.

To the contrary, the majority of the commenters (including CellNet) are like-minded in their assessment that site-by-site licensing affirmatively promotes the public interest, since the process is both efficient and meets the unique needs of private wireless licensees.⁵ Nextel alone claims that competitive bidding is the most efficient method of spectrum licensing in every circumstance, irrespective of the service objectives or the needs of private wireless licensees.⁶ Although the current licensing scheme does require the agency to be involved in the day-to-day licensing process, the Commission cannot justify changing the current scheme solely, or even primarily, for the purpose of administrative efficiency. Otherwise, the obligation to avoid mutual exclusivity would be written out

⁴ 47 U.S.C. § 309(j)(6)(E).

⁵ See Comments of CellNet at 6-7; Comments of Alliant Energy at 1-2; Comments of AAR at 7-8; Comments of API at 12, 14; Comments of the American Water Works Association at 4-5; Comments of Amtech at 1-2; Comments of the Arizona Public Service Company at 4-5; Comments of the Baltimore Gas and Electric Company (“BGE”) at 3; Comments of CEC at 8-10; Comments of Cinergy at 8-11; Comments of Consumers Energy at 5-6; Comments of Entergy at 8-11; Comments of Ford at 2-3; Comments of ICA at 2-3; Comments of LMCC at 3; Comments of the City of Lincoln Water System at 3; Comments of NYSTA at 2-3; Comments of NTCC at 3-5; Comments of OSBA at 3; Comments of PCIA at 3-4; Comments of UEC at 9-10; Comments of UTC at 20-22. Comments of the Western Resources at 5; Comments of the Wisconsin Public Service Corporation at 1.

⁶ Comments of Nextel at 6-12. Nextel, a company providing two-way interconnected digital subscriber-based telecommunications services, has interests that are far-removed from the typical user of private wireless spectrum. In its comments, Nextel fails to recognize that the Commission first has an obligation to avoid mutual exclusivity and thus does not reach a competitive bidding analysis until it determines that the current site-by-site licensing system fails to avoid mutual exclusivity or otherwise disserves the public interest.

of the statute, because a competitive bidding system typically may be easier to administer than a scheme that avoids mutual exclusivity, such as site-by-site licensing on a first-come, first-served basis.

CellNet supports those commenters that explain that it would be error for the Commission under the revised auction statute to interpret section 309(j)(6)(E) as imposing an obligation to avoid mutual exclusivity only when it would further the goals of a competitive bidding system set forth in section 309(j)(3), for example, promoting competition and promptly delivering innovative services to the public.⁷ This does not mean that the current site-by-site licensing regime does not further these goals. Quite the contrary, site-by-site licensing promotes prompt delivery of innovative services to the public by allowing licensees to tailor their systems to provide highly customized services and to cover geographic area specifically designed for the needs of their unique businesses. However, section 309(j)(3) is relevant only when designing a system of competitive bidding and does not come into play unless the Commission first concludes that it cannot employ methods to avoid mutual exclusivity. By relying on section 309(j)(3) before applying sections 309(j)(1) and (6)(E), the Commission erroneously would be “putting the cart before the horse.” In sum, no justification exists for the Commission to depart from its current site-by-site licensing process in favor of a system that would create mutual exclusivity.

⁷ See Comments of AAR at 8-9; Comments of CEC at 7-8; Comments of Cinergy at 5-11; Comments of Entergy at 8-9; Comments of PIRSC at 10-13; Comments of UEC at 5-7; Comments of UTC at 7-8. The goals of section 309(j)(3) do not apply when dealing with private internal radio services used for the day-to-day operations of a business or a government agency. The objectives set forth in section 309(j)(3) were crafted by Congress at a time when the understanding was that the FCC’s auction authority would extend only to situations “where the principal use of that license will be to offer service in return for compensation from subscribers.” H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess., at 481 (1993). Thus, the objectives of section 309(j)(3) were intended to govern the licensing of common carrier and CMRS operations.

II. THE DEFINITION OF “PRIVATE INTERNAL RADIO SERVICE” SHOULD BE MODIFIED TO ENSURE INCLUSION OF THIRD-PARTY PROVIDERS OF ELIGIBLE SERVICES

As noted by the Commission, Congress intended a broader construction of public safety radio services (“PSRS”) under section 309(j)(2) of the Act than the definition of public safety services contained in section 337.⁸ Congress thus included entities not traditionally associated with the public safety service within the PSRS exemption, *e.g.*, non-government entities operating private internal radio services (“PIRS”).⁹ As explained in CellNet’s comments, in order to serve the intent of Congress, the Commission must expansively define the meaning of PIRS, which is a prerequisite for eligibility for the PSRS exemption.¹⁰

The Commission proposes to define PIRS as “a service in which the licensee does not receive compensation, and all messages are transmitted between fixed operating positions located on premises controlled by the licensee and the associated fixed or mobile stations or other transmitting or receiving devices of the licensee.”¹¹ When addressing this proposed definition of PIRS, some commenters expressed concern about the prospect of common carriers and CMRS providers

⁸ NPRM at ¶ 27. See also, H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997).

⁹ 47 U.S.C. § 309(j)(2). Regardless of the clear legislative intent, Nextel proposes that the PSRS exemption only extend to eligibles in the public safety pool. Comments of Nextel at 8. Nextel’s proposal, however, will exclude from the PSRS exemption non-government entities such as utilities and pipeline companies providing PIRS that are clearly intended by Congress to be within the exemption but do not qualify as public safety eligibles. Accordingly, Nextel’s proposal must be rejected, because it contradicts the clear intent of Congress.

¹⁰ Comments of CellNet at 10-11.

¹¹ NPRM at ¶ 32.

accessing limited private wireless spectrum.¹² CellNet shares those concerns and supports barring common carriers and CMRS providers from applying for private wireless spectrum to be used in providing CMRS offerings. To achieve this result, however, the Commission need not adopt an overly restrictive definition of PIRS. As CellNet discussed in its comments, the Commission should ensure that its definition of PIRS will encompass companies who receive compensation for an underlying business activity that requires use of a private internal radio system, so long as the licensee does not receive compensation from subscribers for their direct use of the spectrum itself.¹³ Such a revision would clarify that commercial enterprises may operate “private internal” services, while avoiding concerns that CMRS-type entities would acquire spectrum intended for private wireless licensees. CellNet also would support restrictions on interconnection to the public switched network by PIRS licensees in their provision of private carrier services, to further ensure that private wireless frequencies are not occupied for common carrier or CMRS purposes.¹⁴

III. THE COMMISSION SHOULD PERMIT ANCILLARY NON-PUBLIC SAFETY USES OF AUCTION-EXEMPT PUBLIC SAFETY RADIO SERVICE SPECTRUM

The Commission requested comment on whether it should impose any restrictions on the use of private exempt services to the extent that such systems are used for non-PSRS purposes, such as

¹² See Comments of BGEC at 2; Comments of Cinergy at 19-20; Comments of Entergy at 18-20; Comments of UEC at 19; Comments of UTC at 13-14.

¹³ Comments of CellNet at 10-11.

¹⁴ Cf. Comments of ITA at 11 and Comments of USMSS at 7 (proposing that PIRS include “a third party entity which owns, operates and/or manages a wireless telecommunications infrastructure to meet the internal communications needs of a private wireless entity but whose infrastructure is not interconnected to the public switched network.”).

communications of a routine business nature.¹⁵ CellNet recommended that as long as the “principal use” of the spectrum gained through the PSRS exemption is for public safety, the licensee also should be authorized to use its network for non-exempt purposes.¹⁶ Others commenting on this issue are opposed to either a sole or principal use restriction on eligibility for the PSRS exemption.¹⁷ CellNet recognizes that a sole or majority use restriction may create spectrum inefficiency and otherwise exclude many licensees that Congress intended to exempt from auctions. To ensure the integrity of the licensing process for private radio service spectrum in the absence of a principal use restriction, the Commission should consider adopting CII’s proposal to require a certification on applications that at least one of the functions of the proposed system will be to protect the safety of life, health or property.¹⁸

The public interest reasons advanced by CellNet for permitting ancillary non-public safety uses of auction-exempt spectrum are supported by other commenters. For example, as indicated in the comments, many entities today use their internal radio systems for PSRS as well as routine day-to-day business communications without differentiation, enabling those licensees to use private wireless

¹⁵ NPRM at ¶ 43.

¹⁶ Comments of CellNet at 15.

¹⁷ See Comments of Alliant Energy at 2-3; Comments of AAR at 5-7; Comments of CEC at 22-24; Comments of Entergy at 20-22; Comments of Cinergy at 20-22; Comments of CII at 11-13; Comments of ITA at 14; Comments of the Minnesota Power, Inc. (“MPI”) at 2-3; Comments of PCIA at 6-18; Comments of PIRSC at 16; Comments of UEC at 17-18, 20-22; Comments of USMSS at 8; Comments of UTC at 16-18.

¹⁸ See Comments of CII at 12.

spectrum in a variety of ways to increase cost-efficiency.¹⁹ CellNet agrees with other commenters that requiring licensees to transmit public safety communications over one set of frequencies and non-public safety communications over another would be impracticable and entirely inefficient.²⁰ Moreover, PSRS licensees also should be able to lease excess capacity to non-common carriers on a private carrier basis.²¹ In this way, the Commission will ensure that licensees use private wireless spectrum in the most efficient and cost-effective manner.

Finally, the Commission sought comment on whether non-government entities should be required to obtain state or local governmental approval to qualify for the PSRS exemption.²² CellNet supports commenters opposing such a requirement,²³ because it is unnecessarily restrictive and runs contrary to the plain language of the statute.

IV. THERE IS BROAD SUPPORT FOR THE ADOPTION OF ALTERNATIVE MEASURES TO THE IMPLEMENTATION OF AN APPLICATION FREEZE

CellNet joins other commenters opposing a freeze on the acceptance of new applications.²⁴ If the Commission's intent is to deter speculative applications and to ensure that the goals of the

¹⁹ See Comments of CEC at 23; Comments of Cinergy at 21; Comments of Entergy at 21; Comments of MPI at 3; Comments of UTC at 17.

²⁰ See Comments of CEC at 23; Comments of Cinergy at 21-22; Comments of Entergy at 21; Comments of UTC at 17-18.

²¹ Comments of CellNet at 15; Comments of ITA at 11.

²² NPRM at ¶ 37.

²³ Comments of CII at 13-14; Comments of UTC at 15.

²⁴ See Comments of CellNet at 17-20; Comments of API at 18-19; Comments of CEC at 28-30; Comments of Cinergy at 26-28; Comments of Entergy at 25-27; Comments of NTCC at 20-21; Comments of UEC at 26-28.

instant proceeding are not compromised, it has alternative means to do so that will not have as severe an impact on applicants. For example, in lieu of a blanket freeze, the Commission could adopt abbreviated construction deadlines — as proposed by API, NTCC and CellNet — to ensure that applicants are not seeking licenses simply to warehouse the spectrum.²⁵

V. CONCLUSION

For the foregoing reasons, the Commission should take action consistent with the views expressed herein.

Respectfully submitted,

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²⁵ See Comments of CellNet at 19-20; Comments of API at 18-19; Comments of NTCC at 20-21.